85-190

Supreme Court, U.S.
FILED
JUL 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

KELVIN DENNIE, Individually and
on behalf of his minor son, NKOSI,

Petitioners

VS.

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE
AND PRESBYTERIAN UNIVERSITY HOSPITAL,
AND NIEL WALD, M.D. AND JOHN DOE

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Kelvin Dennie
P.O. Box 7169
Sunny Isle
Christiansted, St. Croix
U.S.V.I. 00820
(809) 778-0621

Petitioner, Pro Se

QUESTIONS PRESENTED

a) Under § 552a(g)(5) of the Privacy Act is an individual entitled to a claim of immunity for violation of an Act construed to be a constitutional tort.

The question concerns waivers of the United States sovereign immunity. Waivers of sovereign immunity from suit are strictly construed[1] and cannot be implied but must be unequivocally expressed.[2] Contractors with the United States, and employees or agents of federally funded programs are not entitled to a claim of immunity under the provisions of the FTCA.[3] Since an unconstitutional act, even in authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense.[4]

b) Can a federal court having by the law of its organization jurisdiction of the subject matter of a suit, and of the parties thereto, by appropriate process served anywhere within the limits of the territory over which the federal government exercises dominion, bring before it all the parties necessary to its decision.

The question concerns the exercise of the judicial power of the United States, (Art. III § 2 cl.I) vested in the Supreme Court and other courts, its applicability to all controversies of a justicable nature arising within the territorial limits of the nation no matter who may be the parties thereto,[5] and the assertion of personal jurisdiction over defendants served by a wholly federal method of process.[6]

---

[1]United States v. Sheerwood, 312 US 584, 590
[2]United States v. King, 395 US 1,4
[3]United States v. Orleans, 425 US 807, 813-814
[4]Butz v. Economou, 438 US 478, 490-491
[5]Kansas v. Colorado, 206 US 46, 51 L.Ed 956, 27 S.Ct. 655
[6]Fitzsimmons v. Barton, 589 D F.2d 330, 333; First Flight Company v. National Carloading Corporation, 209 F. Supp. 730, 735-738; and Fraley v. Chesapeake and Ohio Railway Company, 397 F. 2d 1, 4

LISTING OF PARTIES

Petitioners are:

Kelvin Dennie, individually and
on behalf of his minor son
Nkosi

Respondents are:

University of Pittsburgh School of Medicine
and Presbyterian University Hospital
and Niel Wald, M.D.
and John Doe

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)
LISTING OF PARTIES ..... (ii)
TABLE OF AUTHORITIES ..... (iv)
OPINION BELOW 1
STATEMENT OF JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 7
CONCLUSION 10
APPENDIX A
Reported Opinion Of The District Court
Of The Virgin Islands Dated June 8, 1984 ..... A-1
APPENDIX B
Order Of The Court Of Appeals For The Third Circuit
Affirming The District Court B-1
APPENDIX C
Order Denying Petition For Rehearing In Banc C-1
APPENDIX D
5 USCS 552a(b) D-1
5 USCS 552a(g)(5) D-1
5 USCS 552a(e)(9) D-1
APPENDIX E
21 CFR 20.63 ..... E-1
21 CFR 21.1(a) E-1
APPENDIX F
28 USCS 1331 ..... F-1
48 USCS 1612 ..... F-1
USCS Constitution, Art. III, § 2, cl.I F-1
Rule 4(d)(3) Fed. Rule of Civ.P. F-2

STATEMENT OF JURISDICTION

The judgment of the District Court was entered on June 8, 1984. The order of the Court of Appeals affirming the District Court was entered May 3, 1985. The jurisdiction of this Court is invoked under 28 USCS 1257.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are sections of the Privacy Act governing the maintenance and disclosure of medical records and penalties for non-compliance 5 USCS 552a(b), 5 USCS 552a(e)(9), 5 USCS 552a(g)(5). Also the federal question statute 28USCS 1331, Art. III § 2 cl.I of the United States Constitution, 48 USCS 1612, and Code of Federal Regulations §§ 21 CFR 20.63 and 21 CFR 21.1(a). Rule 4(d)(3) Fed. Rule of Civ.P.

STATEMENT OF THE CASE

On December 29, 1983 plaintiffs (Appellants) filed complaint in the District Court of the Virgin Islands. The complaint alleges defendants (Appellees) acts violated provisions of the Privacy Act (5 USCS 552a), and §§ 20.63 and 50.20 of Title 21 Code of Federal Regulations. (Complaint at 18, 38, and 41 respectively.) Personal jurisdiction over defendants was based on § 552a(g)(5) of the Privacy Act.

On March 7, 1984 defendants filed motion to dismiss for lack of personal jurisdiction and for failure to state a claim against them under the Privacy Act. The first question presented for review was raised by defendants in their motion to dismiss. Defendants argued that;

> "A claim against an individual for violation of the Privacy Act will be dismissed, since liability for violation of the act relies solely upon the agency." (brief in support of defendants motion to dismiss pg. 4).

On March 14, 1984 plaintiffs filed motion for extension of time to respond to defendants motion to dismiss, and for production of documents relative to plaintiffs first set of interrogatories.

On March 26, 1984 defendants filed motion opposing any court ordered interrogatories or document requests for defendant Wald.

Thereafter, parties were informed that the Court had scheduled oral arguments for April 11, 1984.

On April 6, 1984 plaintiffs filed motion in response to defendants motion to dismiss. The second question presented for review was raised in said motion. Plaintiffs argued that:

> "The principles of *International Shoe* are grounded upon concepts of territorial limitations of the power of the respective state to subject non-residents to the jurisdiction of their Courts. Federal jurisdiction is conferred by federal statute and not by the 'parties diverse citizenship, and whenever a federal right is involved, as it is here, it is not the Virgin Islands but the United States of America which would be exercising its jurisdiction over the defendants,"

> "It is clear that defendants reside within the territorial boundaries of the United States, and, minimal contracts required to justify the federal government exercising power over them, are present," (memorandum in support of plaintiffs response to defendants motion to dismiss pg. 6)

Plaintiffs also argued against the immunity defense, under the Privacy Act, raised by defendants.

> "It is also evident in the same Chocallo case that an individual may be held liable for his violation of the Privacy Act where circumstances so dictate. ****. The Supreme Court has recently held that to be entitled to qualified immunity a defendant's conduct must not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (memorandum in support of plaintiffs response to defendants motion to dismiss pg. 9)

On April 11, 1984 the District Court heard oral arguments in regards to the questions presented for review.

On June 8, 1984 the District Court dismissed plaintiffs complaint holding that:

> "the terms of section 552a simply do not apply to individuals." (memorandum opinion & order pg. 7).

In dismissing the complaint for lack of personal jurisdiction the court stated that:

> "Assuming without deciding that on this line Dennie states a valid claim, the Privacy Act by its terms only allows for nationwide personal

jurisdiction in actions against a federal agency." (memorandum opinion & order pg. 10).

The court also ruled that defendants did not have minimum contacts necessary to satisfy constitutional requirements of due process, that would justify the exercise of personal jurisdiction pursuant to Virgin Islands long-arm statute. (memorandum opinion & order pg. 11).

On June 15, 1984 plaintiffs filed motion for reconsideration of judgment and for leave to amend complaint. The amended complaint alleges that:

"This Court has subject-matter jurisdiction pursuant to the Revised Organic Act of the Virgin Islands Ch. 588, § 22, 68 Stat. 506". (amended complaint at 19.)

and

"Wherein this complaint asserts a federal right, and personal service of process was made in accordance with the provisions of Rule 4(d)(3) of the Federal Rules of Civil Procedure, this Court has personal jurisdiction over defendants." (amended complaint at 22.)

On July 12, 1984 the Court issued an order denying both motions. Basis for its denial was that:

"the original complaint in this matter and the proposed amended complaint are totally devoid of any allegations which would satisfy the condition precedent to § 4903(a)(4)," (V.I. long-arm statute)

and

"For the reasons stated in the June 8, 1984 memorandum opinion in this matter." (order July 12, 8:20 AM '84)

On July 24, 1984 plaintiffs filed Notice of Appeal. Appellants brief was filed October 9, 1984. The first question presented for review was again raised before the Court of Appeals. There, appellants argued that:

"One of the purposes of the Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies, except as otherwise provided by law, to be subject to civil suit for any damages which occur as a result of willful or intentional actions which violates any individual's right under the Act. (Congress-

ional Findings and Statement of Purpose, Act. Dec. 31, 1974, P.L. 93-579 § 2, 88 Stat. 1896, (b))." (brief of appellants, pg. 10.)

Appellants went on to argue that:

"It was clear that Congress did not intend that § 552a(g)(5) of the Privacy Act be construed as a total waiver of the United States sovereign immunity. Any waiver of immunity under this section is limited to the provisions of the Federal Tort Claim Act (28 USCS 1346(b) and 2671 et. seq)." (brief of appellants pg. 10).

Further emphasizing this point the brief went on to state that:

"A waiver of sovereign immunity cannot be implied but must be unequivically expressed." (citing, *United States v. King* 395 US 1,4)"

and

"Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense." (citing, *Butz v. Economou*, 438 US 478, 490-491). (brief of appellants pg 11).

The final argument presented was that:

"The Supreme Court held that, any contractor with the United States, and employees or agents of federally funded programs, are excluded from the coverage of the Federal Tort Claim Act." (citing, *United States v. Orleans* 425 US 807, 813-814).

and,

"Appellees as federal grantees (App. pg. 23) are clearly excluded from the coverage of the Federal Tort Claim Act and are therefore not entitled to a claim of immunity for their violations of the Privacy Act." (brief of appellants Pg. 11).

The District Court misconstrued section 552a(g)(5) of the Privacy Act, as granting immunity to appellees.

In regards to the second question presented for review appellants, on appeal, argued that:

"Service of summons is the process by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." (appellants reply brief pg. 9).

Appellants relied on 48 USCS 1612 to show the Virgin Islands

Court has venue and jurisdiction of the subject matter of this suit.

> "By the enactment of 48 USCS 1612 Congress intended to grant and did grant to the District Court of the Virgin Islands federal question jurisdiction as contained in the Constitution, Art. III, § 2, cl. I and the federal question statute, 28 USCS 1331(a)."

"The statute states in relevant part that,"

> "The District Court of the Virgin Islands shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy. . . (appellants brief pg. 8).

Relying on the decision in *Fraley v. Chesapeake & Ohio Railway Co.* 397, F. 2d 1 (CA 3rd Cir.(1968)) appellants argued that:

> "Rule 4(d)(3)" (of Fed. Rule of Civ. P.) "is a federal method of obtaining in personam jurisdiction, in cases where federal law governs amenability to suit." (appellants reply brief pg. 15).

and in this case,

> "where the court sits as a district court of the United States and not of the Virgin Islands alll that is necessary to satisfy due process in the exercise of personal jurisdiction over Appellees is that they have minimum contacts with the United States." citing, *Staffin v. Greenberg*, 509 F. Supp. 825, 831 (E.D. Pa. (1981)). (appellants reply brief page 10-11).

On appeal appellees argued, on the first question presented for review, that:

> "The Privacy Act provides for civil remedies only against the agency and not against individuals." (appellees brief pg. 11).

The second question presented for review was addressed by appellees by the simple statement that:

> "This is not a federal question by virtue of plaintiffs averring the Privacy Act." (appellees brief pg. 13).

The panel, (for the Third Circuit Court of Appeals) on their regular scheduled visits, travelled to the Virgin Islands and heard oral arguments on April 22, 1985.

During oral arguments appellants argued that the complaint satisfies all the requisited of a substantial federal question, (citing, *PAAC v. RIZZO,* 502 F.2d 306, 312) and that where the complaint asserts federal and constitutional rights and service of process was made in accordance with the provisions of Rule 4(d)(3) of Fed. Rules of Civ. P. the court has personal jurisdiction over appellees.

Appellees argued they are not federal agencies and therefore not subject to civil remedies provided for by the Act.

On May 3, 1985 the Court of Appeals entered a judgment order affirming (without opinion) the District Court.

On May 14, 1985 appellants, appearing Pro Se, filed a petition for rehearing in banc. Appellants, in regards to the second question presented for review, argued due process limitations and the basic fairness test in the exercise of in personam jurisdiction over non-resident defendants. Appellants cited *Shaffer v. Heitner,* 433 US 186, 97 S. Ct. 2569, 53 L.Ed. 683 as a basis for said argument. It was also shown that the 3rd Cir. Court of Appeals,

> "in applying the basic fairness test to federal law of process, held Rule 4(d)(3) of the Federal Rules of Civil Procedure the applicable federal law in determining in personam jurisdiction where the complaint asserts a federal right." (appellants petition for rehearing in banc pg. 2).

The petition for rehearing in banc was denied June 7, 1985. Notice of Appeal to the Supreme Court of the United States was filed June 20, 1985. The matter is now before this Court for consideration.

REASONS FOR GRANTING THE WRIT

The jurisdiction of this Court is invoked on grounds that:

(1) A state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

(2) The District Court has interpreted a federal statute in a way that deprives appellants of the right under the acts of

Congress (5 USCS 552a(g)(5)) to have this suit tried and adjudicated in federal court in the district where plaintiff (appellant) resides. Dismissal of the complaint for lack of personal jurisdiction also deprives appellants of the right, by the Constitution of the United States (Art. III, § 2, cl. I) and the Acts of Congress (48 USCS 1612) to have this case tried and adjudicated in federal court in the United States Virgin Islands.

The following cases sustain the jurisdiction of this Court in this matter:

Hammond v. Whittredge (1907) 204 US 538, 51 L.Ed. 606, 27 S.Ct. 396.

Murray v. Joe Gerrick & Co. (1934) 291 US 315, 78 L.Ed. 821, 54 S.Ct. 432.

Pennekamp v. Florida (1946) 328 US 331, 90 L.Ed. 1295, 66 S.Ct. 1029.

Williams v. Bruffy (1880) 102 US 248, 26 L.Ed. 135.

Jurisdiction of the Supreme Court could be invoked where rights under federal statute is claimed, and that statute was referred to in and was element of decision of state court. (*Hammond,* supra.)

Averment in petition for certiorari that state court misconstrued act of Congress conferred jurisdiction on Supreme Court. (*Murray,* supa.)

Appellants claim of a deprivation of a right under federal statute (5 USCS 552a(g)(5)), and statement in petition that the district court misconstrued section 552a(g)(5) as granting immunity to appellees bring this matter within the provisions precedent to Hammond and Murray, necessary to sustain the jurisdiction of this Court.

United States Supreme Court had final authority to determine meaning and application of the words of Constitution which required interpretation to resolve judicial issues. (*Pennekamp,* supra.)

Whenever highest court of state, by any form of decision, affirms or denies validity of judgent of inferior court over which it can exercise appellate authority, jurisdiction of Supreme Court to review such decision, if it involves a federal question, will attach upon proper proceeding. (*Williams*, supra.)

The United States Court of Appeals for the Third Circuit is highest court of state in which decision could be had, within statute making this judgment reviewable by United States Supreme Court.

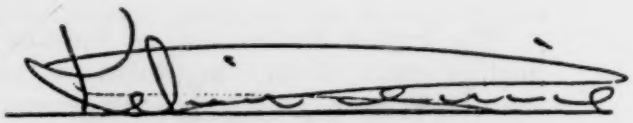
48 USCS 1612 authorizes the district court of the Virgin Islands to exercise the same but no more judicial power than district courts of the United States have under Art. III, § 2. In dismissing this complaint on constitutional grounds the district court erroneously limited a federal action by a constitutional provision applicable only to state action. There is nothing in the Constitution granting appellees exemption from process of federal court before which is brought an action such as confers jurisdiction pursuant to 28 USCS 1331. If there is, then this Court has final authority to determine meaning and application of the words of Constitution that grant such exemption. Appellants are unaware of any case where this Court or any other court in the entire United States held that, the judicial power granted by Congress to inferior courts, in cases arising under the Constitution and laws of the United States, is limited to geographical boundaries where such courts sit.

The decision of the district court concerning personal jurisdiction and liability under the Privacy Act is precedent. Review by this Court is appropriate for the guidance and benefit of other litigants and inferior courts in this country, where the exact same issues may have to be decided, and reliance being placed on the reported opinion in this matter, as authoritative.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

DATED: July 8, 1985

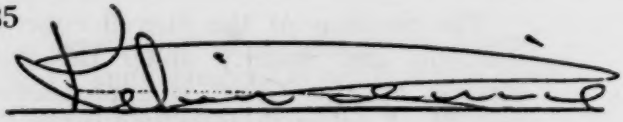


Kelvin Dennie
Appellant (petitioner) Pro Se
P.O. Box 7169
Sunny Isle, Christiansted
St. Croix, USVI 00820
Tel: (809) 778-0621

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument were forwarded certified mail to Vincent A. Colianni, Esq., 46 King Street, Christiansted, St. Croix, USVI 00820, and also to Ingrid M. Lundberg, Esq., and Larry A. Silverman, Dickie, McCamey and Chilcote, 3180 US Steel Building, Pittsburgh, Pa. 15219.

DATED: August 1, 1985



Kelvin Dennie

APPENDIX

Appendix A

Kelvin DENNIE Individually and on Behalf of his Minor Son Nkosi, Plaintiffs,

v.

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE and Presbyterian University Hospital and Niel Wald, M.D. and John Doe, Defendants.

Civ. No. 83/389.

District Court, Virgin Islands, D. St. Croix.

June 8, 1984.

Patient who alleged that private medical records had been improperly disclosed by Pennsylvania physician brought action against the physician, school of medicine, and hospital. On motions to dismiss for lack of jurisdiction, the District Court, David V. O'Brien, J., held that: (1) even if claim was stated under the Privacy Act, hospital and medical school were not federal agencies and thus not subject to nation-wide in person-am jurisdiction; (2) the Privacy Act did not apply to acts of individual physician; and (3) there was no basis for jurisdiction under Virgin Islands long-arm statute.

Dismissed.

1. **Records – 31**

Privacy Act does not apply to individuals. 5 U.S.C.A. § 552a.

2. **Records – 31**

Although hospital and medical school were recipients of federal research grants and subject to federal supervision, they were not subject to such federal control as to make them federal entities subject to the Privacy Act. 5 U.S.C.A. § 552(e).

3. **Federal Courts – 1023**

Because hospital and medical school were not federal agencies, they were not subject to nationwide personal jurisdiction even if a valid claim was stated against them under the Privacy Act. 5 U.S.C.A. § 552a.

4. **Federal Courts – 1023**

In order for nonresident defendants to be amenable to suit in the Virgin Islands under the long-arm statute, the cause of action must arise out of the basis for the court's exercise of in personam jurisdiction. 5 V.I.C. § 4903(b).

5. **Federal Courts – 1024**

Where gravamen of claim was that physician in Pennsylvania violated professional duty to patient by revealing sensitive information in patient's medical file to persons not entitled to view it, the claim did not arise from any contract which the physician or hospital might have with a Virgin Islander employer and the existence of that contract did not subject the physician or the hospital to long-arm jurisdiction in the Virgin Islands in the patient's suit. 5 V.I.C. § 4903(b).

6. **Federal Courts – 1023**

In absence of any showing that any defendant was ever present in the Virgin Islands, they did not commit any act or omission in the Virgin Islands which would subject them to long-arm jurisdiction. 5 V.I.C. § 4903(a)(3).

7. Federal Courts – 1023

Although hospital and medical school may have received federal funds and have been subject to some federal supervision, there was an insufficient nexus between them and the federal government to convert them into federal agencies for purposes of mandamus jurisdiction. 28 U.S.C.A. § 1391(e).

8. Federal Courts – 1023

Plaintiff bore the burden of establishing jurisdiction.

Randall Johns, Christiansted, V.I., for plaintiffs.

Vincent A. Colianni, Christiansted, St. Croix, V.I., for defendants.

MEMORANDUM OPINION & ORDER

DAVID V. O'BRIEN, District Judge.

THIS MATTER is before the Court on Motion of Defendants the University of Pittsburgh School of Medicine, Presbyterian University Hospital, and Niel Wald, M.D., to dismiss the above captioned matter pursuant to Fed.R.Civ.P. 12(b) for lack of *in personam* jurisdiction, and for failure to state a claim upon which relief can be granted. The parties submitted memoranda and supporting affidavits and participated in oral argument before this Court on April 11, 1984. For the reasons which follow we will dismiss this matter for lack of personal jurisdiction over all defendants and, because such a determination is totally dispositive, this Court need not consider the failure to state a claim issue.

1. BACKGROUND

This Court is not unfamiliar with the occurrences precipitating the present action. Kelvin Dennie (hereafter "Dennie") has on three prior occasions within the past two years filed suit in this forum asserting claims substantially similar to those now raised.

With only slight changes, these previous actions have all been filed against the same collection of defendants.[1] In two of those actions, where Dennie appeared *pro se*, the complaints were *sua sponte* dismissed for lack of personal jurisdiction over the defendants.[2] In the remaining action where plaintiff was, as now, represented by counsel, the matter terminated in a joint stipulation of dismissal without prejudice to Dennie's later filing in a court of competent jurisdiction.[3]

The genesis of Dennie's present grievance is to be found in an even earlier civil dispute. Dennie, along with his minor son Nkosi, were named plaintiffs in the case of *Dennie v. Hess Oil Virgin Islands Corp., et al,* Civil No. 177/1977 (D.V.I., Division of St. Croix filed August 31, 1977) (hereafter "HOVIC" and the "HOVIC case"). There Dennie contended that while working as a radiographer for a subcontractor of HOVIC at the refinery on St. Croix, he developed neutropenia,[4] due to his constant exposure to radioactive isotopes contained in a gamma ray projector and other testing equipment used by him during the course of his employment. Dennie sought damages from HOVIC and the manufacturer of the testing devices for his own disability and physical and mental anguish as well as for that of his son, who Dennie alleged was born with sickle cell anemia due to Dennie's exposure to radiation. In May of 1980, Dennie and his son travelled to Pittsburgh, Pennsyl-

[1]Dennie's earlier filings also named Dr. Wald and Presbyterian University Hospital as defendants. Dennie on one occasion brought a Michelle Wanto into the fray. This is the first action to name the University of Pittsburgh School of Medicine.

[2]Civil Nos. 83/227 and 82/251 (D.V.I., Division of St. Croix)

[3]Civ. No. 82/52 (D.V.I., Division of St. Croix)

[4]Neutropenia is a condition where the blood contains fewer than the normal number of white blood cells. The term is often used in reference to the disease more commonly known as leukemia. *See, e.g.* Schmidt's Attorney's Dictionary of Medicine (1982).

vania for the administration of several tests to determine the existence, the nature and extent of any possible radiation injury to them. These tests were all performed at the facilities of Defendant University of Pittsburgh School of Medicine (hereafter "Medical School") located on the premises of Defendant Presbyterian University Hospital (hereafter "Hospital"). Thereafter, on June 10, 1980. Defendant Niel Wald, M.D. (hereafter "Dr. Wald"). Director of the Department of Radiation Medicine at the Hospital communicated, through counsel, to the defendants in the HOVIC case. Dr. Wald opined that on his review of the results of the tests performed on Dennie and his son, there was "very little basis" to support the Dennies' contention that any problems with their health were the result of Dennie's occupational exposure to radiation. (Exhibit E, Attached to complaint). It is the parties' disagreement over the purpose of these tests, and the posture of Dr. Wald in imparting his opinion as to their results, which forms the core of Dennie's present (and prior) litigation.

Dennie contends that he consented to the tests performed on himself and his son in order to aid investigational research into the production and distribution of blood cells. (Complaint, § 14 at 3). The testing would also be helpful in determining for Dennie himself whether his developing neutropenia was a consequence of his exposure to radiation in the course of his employment. (*Id.*, § 16 at 3). Dennie asserts that he was never informed that the testing was conducted at behest of the HOVIC defendants or was in any way connected with the then ongoing HOVIC litigation. (Affidavit of Dennie, filed March 14, 1984). Consequently, Dennie concludes that: 1) Dr. Wald's June 10th letter was an unauthorized release of confidential information which violated Dennie's physician/patient privilege, and that 2) Dr. Wald's opinions to Dennie and the HOVIC defendants were fraudulent and misrepresented the extent of Dennie's injuries, causing him to settle the HOVIC case for less than an appropriate amount.[5]

[5]Dennie settled the HOVIC matter for $250,000.

The defendants here: Dr. Wald, the Medical School and the Hospital, have a different recollection altogether and assert quite the opposite. They contend that the examination and testing of Dennie and his son was simply discovery in the HOVIC matter done at the request of defense counsel for HOVIC and with the consent of counsel for Dennie. Defendants do not sit and wait on the defense of waiver, however, but seek summary dismissal of this case on the grounds of lack of personal jurisdiction in this forum as all transactions and occurrences producing the present suit took place in Pittsburgh, Pennsylvania.

II. DISCUSSION

Dennie does not allege that any of the defendants' activities complained of occurred within the Virgin Islands.[6] He submits, however, that this Court should exercise personal jurisdiction over the nonresident defendants as: 1) defendants are so closely associated with a federal agency as to be accessible here through the nationwide personal jurisdiction provided in the Privacy Act, 5 U.S.C. § 552a; and 2) defendants' purposeful contacts with the territory are such that all are amenable to process in this jurisdiction through the exercise of the Virgin Islands long arm statute, 5 V.I.C. § 4903.

A) The Privacy Act

Dennie seeks compensation from the defendants for their alleged violation of the Privacy Act, 5 U.S.C. § 552a. Section 552a generally provides restrictions on what information a federal agency may keep about private individuals, and prevents, with limited exceptions, the agency's disclosure of any information concerning an individual absent that individual's

[6]Dennie's complaint makes no such allegations. In Plaintiff's Response to Defendants Motion to Dismiss Dennie argues that the claims arose from the defendant' activities within the Virgin Islands.

request or written consent. 5 U.S.C. § 552a, §§ 552a(b)(1)-(11). The Privacy Act goes on to set up remedies for violation of its terms and nationwide jurisdiction for its enforcement. It allows that one aggrieved by a federal agency's wrongful disclosure of information pertaining to him may bring a civil damage action against that agency in the district court of the United States located where the complaintant resides. 5 U.S.C. §§ 552a(g)(4) and (g)(5).

Dennie faces a problem in reaching the present defendants through the Privacy Act, however, as the statute, by its own terms, applies only to federal agencies and agency records. 5 U.S.C. §§ 552a(a)(1) and (a)(4). Dennie attempts to bypass this limitation contending that by receiving federal grants from and participating in cooperative research projects with the Bureau of Radiological Health (hereafter "BRH"), Dr. Wald, the Medical School and the Hospital have become so intertwined with a federal agency (the BRH) as to become subject to the restrictions of the Privacy Act.

In determining whether any of defendants are a "federal agency" and thus suable in the Virgin Islands pursuant to Section 552a's broad grant of *in personam* jurisdiction, we look first to the statute itself. The Privacy Act adopts the definition of agency as found in the Freedom of Information Act (hereafter "FOIA"). *See* 5 U.S.C. § 552a(a)(1). The FOIA, in turn incorporates the definition as contained in the Administrative Procedure Act, 5 U.S.C. § 551(1), which defines "agency" to mean "each authority of the Government of the United States, whether or not it is written or subject to review by another agency." *See* 5 U.S.C. § 552(e). The FOIA was then amended in 1974 to provide as follows:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government Corporation, Government controlled corporation; or other establishment in the executive branch of the Government (including the

> Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(e). It was intended that this broader language in section 552(e) bring federal entities under the purview of the Privacy Act and the FOIA which would not have been so regulated prior thereto. *See* H.R.Rep. No. 93-876, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. of Ad. News 6267.

(1) It is not clear into which category in this expanded definition of agency Dennie intends to group the defendants. Regardless, Dr. Wald will not fit. Assuming for the moment that Dr. Wald's relationship with either his co-defendants of the BRH rendered him a governmental employee or official, the terms of § 552a simply do not apply to individuals. *Windsor v. The Tennessean,* 719 F.2d 155 (6th Cir. 1983) *reh. denied* (1984); *Bruce v. United States,* 621 F.2d 914, 916 n. 2 (8th Cir.1980); *Parks v. United States Internal Revenue Service,* 618 F.2d 677 (10th Cir. 1980). Had Congress the intent to subject individuals to the civil remedies provided in Privacy Act it certainly had the wherewithal to do so, as it did choose to subject individuals to criminal penalties provided in 5 U.S.C. § 552a(i). *See Windsor, supra,* n. 5 at 160.

(2) We do not see the Hospital or Medical School as reachable under the Privacy Act either. Regardless of what § 552 (e) label Dennie could place on these defendants, he has not made the threshold showing of substantial federal control or supervision necessary to characterize an entity as "federal" for these purposes. *See Forsham v. Harris,* 445 U.S. 169, 180-81, 100 S. Ct. 977, 63 L.Ed.2d 293 (1980); *Irwin Memorial Blood Bank v. American National Red Cross,* 640 2d 1051, 1054-55 (9th Cir.1981); *Rocap v. Indiek,* 539 F.2d 174, 177 (D.C.Dir.1976). While this federal control may be "manifested in various forms" and consists of a "confluence of several 'federal' characteristics," Dennie has alleged no facts which make either defendant a federal agency. *See Irwin, supra* at 1055.

Dennie does allege that both the Hospital and the Medical School were recipients of federal research grants from the BRH,

and thus subject to federal supervision, but this in and of itself is not sufficient. In *Forsham, supra* the Supreme Court faced the issue of whether a university diabetes group which received all of its funding from the federal government was an agency subject to FOIA requirements. In holding that it was not, the Court plainly stated that "absent extensive, detailed and virtually day-to-day supervision," the recipient of public funds does not become a federal instrumentality or an FOIA agency. *Forsham, supra*, at 180. As Dennie alleges no such comprehensive supervision, he cannot reach defendants on the sole basis of their being federal grantees.

The *Irwin, supra,* court sets out several other factors to consider in determining whether an organization is a federal agency under § 552(e). The dispute there focused on a blood bank's attempts to order the Red Cross to disclose financial records through the FOIA. In holding that the Red Cross was not a federal agency for FOIA purposes, the court looked to: 1) whether the federal government played a role in organizing the institution; 2) whether the United States particularly appropriated funds for the benefit of the institution; and 3) whether governmental officials directed the daily affairs of the institution. While recognizing that the Red Cross was subject to a certain amount of federal supervision, the Court found in the negative as to all the forementioned considerations and held the Red Cross not to be subject to the FOIA. Applying the *Irwin* criteria to the matter *sub judice*, we cannot help but conclude that there is no substantial federal supervision and control over the Hospital and Medical School, and thus, they are not federal agencies. Dennie has simply made no allegations, nor pointed this Court to any lines of authority, which suggest the contrary.

Dennie, alternatively, makes the somewhat unique argument that even if the defendants are not agencies, their research records are nonetheless records of a federal agency subject to the strictures of the Privacy Act. He apparently bases this assertion on two grounds: first, that a federal agency (the BRH) will eventually have access to the information contained in the records and, second, that the agency will, subsequent to receiv-

ing the records, take some action in reliance thereon. Thus, Dennie concludes, the agency has the responsibility to establish rules and procedures to insure these records are maintained in compliance with the Privacy Act. *See* 5 U.S.C. § 552a(e)(9).

(3) While unique, the argument has one critical fault. Assuming without deciding that on this line Dennie states a valid claim, the Privacy Act by its terms only allows for nationwide personal jurisdiction in actions against a federal agency. 5 U.S.C. § 552a. As we have just seen, not one of the defendants present here falls into that class. Consequently, Dennie's attempt to bring defendants into this jurisdiction on the basis of the Privacy Act must fail.

B) The Long Arm Statute

Dennie also attempts to bring defendants into this forum through the exercise of the Virgin Islands long arm statute, 5 V.I.C. § 4903. Section 4903 does enable this Court to assert personal jurisdiction over nonresident defendants, providing in pertinent part:

> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent as to a claim for relief arising from the person's
>
> > (2) contracting to supply services or things in this territory;
> >
> > (3) causing tortious injury by an act or omission in this territory;

5 V.I.C. §§ 4903(a)(2) and (a)(3).[7] Defendants challenge the application of the long arm statute to them both statutory and constitutional grounds.

---

[7]Those familiar with this act may wonder why jurisdiction was not sought under § 4903(a)(4) which allows jurisdiction for ones "causing tortious injury in this territory by act or omission outside the territory". Dennie is barred by *res judicata* from utilizing this subsection as it was previously raised in Civ. No. 82/251 which was dismissed for lack of personal jurisdiction. *See* note 2, supra.

We note initially that we need not determine whether or not the defendants here have had sufficient "minimum contacts" with the territory as required by the due process clause of the Constitution. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Hanson v. Denkla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). It has not yet been determined whether the range of the Virgin Islands long arm statute is coextensive with the fathermost reaches of the due process clause and, thus, whether the Supreme Court's one-step "minimum contracts" analysis in the forementioned line of cases is appropriate. *See Carty v. Beech Aircraft Corp.,* 679 F.2d 1051 (3d Cir.1982); *Hendrickson v. Reg O Co.,* 657 F.2d 9 (3d Cir.1981); *see generally* R. Casad, *Jurisdiction in Civil Actions* 4-5—4-7 (1983). This court will instead make a two step inquiry into the question of long arm jurisdiction. We will look first to whether the exercise of jurisdiction is authorized by the terms of the statute, and only if the answer is in the affirmative, then second, to whether the exercise of jurisdiction is consistent with the constitutional requirements of due process. *Hahn v. Vermont Law School,* 698 F.2d 48 (1st Cir. 1983); *Peanut Corp. of America v. Hollywood Brands,* 696 F.2d 311 (4th Cir.1982); *Montaire Feeds v. Agro Impex,* 677 F.2d 651 (8th Cir.1982); *Yarbrough v. Elmer Bunker,* 669 F.2d 614 (9th Cir.1982).

(4) Dennie first attempts to get jurisdiction over defendants based on their "contracting to supply services . . . in this territory" per § 4903(a)(2). The gist of this argument appears to be that, if defendants were indeed performing tests on Dennie pursuant to discovery in the HOVIC radiation case, defendants must have intended, at some later point in time, to appear in the Virgin Islands as defense experts for depositions or at trial. Initially we note that nowhere in his complaint does Dennie ever make the necessary allegations concerning the existence of such a contract. Assuming for the sake of argument however, that a contract did exist, that existence on its own does not vest this Court with jurisdiction over the defendants in this matter. Dennie overlooks the import of the

second major sub-section of Section 4903 which allows that "only a claim for relief arising from the acts enumerated in this section may be asserted against him." 5 V.I.C. § 4903(b). Thus, in order for these nonresident defendants to be amenable to suit in the Virgin Islands under the long arm statute, the cause of action must arise out of the basis for this Court's exercise of *in personam* jurisdiction. *See, e.g. Time Share Vacation Club v. Atlantic Resorts, et al,* 735 F.2d 61 (3d Cir. 1984) (Pennsylvania law); *De James v. Magnificence Carriers,* 654 F. 2d 280 (3d Cir.), *cert. denied* 454 U.S. 1085, 102 S.Ct. 642, 70 L.Ed2d 620 (1981) (New Jersey law).

(5) Dennie has not shown the necessary nexus between this action and that contract. The gravamen of this claim is that a physician in Pennsylvania violated his professional duty to Dennie by revealing sensitive information in Dennie's medical records to persons not entitled to view them. In no way can this be viewed as a claim "arising from" a prior contract for services to which Dennie was never a party.

(6) The second prong of Dennie's long arm jurisdictional assertion is that defendants caused a "tortious injury" to Dennie by "an act or omission in this territory." 5 V.I.C. § 4903(a)(3). A review of the pleadings reveals no instance in which any defendant was ever present in the Virgin Islands, much less that one committed an "act or omission" harming Dennie while here. Regardless, the "legislative history" to § 4903(a)(3) located in the Commission's Comment does not lend itself to Dennie's interpretation. It notes that "(a)(3) applies when the tortious act or omission occurs in the state even though *the resulting injury occurs elsewhere.*" 13 Unif. L.Ann. § 1.03 at 468. (emphasis added) Dennie's allegations cannot reasonably be viewed as stating any claim arising out of defendants' activity within the Virgin Islands. Consequently, jurisdiction cannot be premised on section 4903(a)(3).

Summing up then, we find that personal jurisdiction over Dr. Wald, the Hospital and the Medical School cannot be asserted under § 4903(a)(2) because Dennie's claim does not arise out of a contract to provide services in the territory,

nor under § 4903(a)(3) as there was no act or omission by defendants in the Virgin Islands.

C) 28 U.S.C. § 1391(e)

(7) Dennie makes a final attempt to persuade this Court to compel defendants to appear in the Virgin Islands. He relies on § 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e) which provides in part that:

> (a) civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may, except as otherwise provided by law, be brought in any judicial district in which (4) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e). The act itself does not define the term "agency" but the intent of Congress in using the term can be discerned by looking to the committee report which indicates that "agency" means any department, administration, commission, independent establishment, authority, board or bureau of the United States, or any corporation in which the United States has a proprietary interest. S.Rep. No. 1992. 87th Cong., 2d Sess. *reprinted in* 1962 U.S. Code Cong. & Ad. News 2784, 1785. Once, again, this Court is without sufficient allegations to enable us to determine into which enumerated category Dennie would attempt to place defendants. Regardless, they would not fit here either. Dennie cannot point this Court to any nexus between the defendants and the United States government sufficient to convert them to federal agencies. *See Powers v. Mitchell,* 463 F.2d 212 (9th Cir.1972) (local draft board not agency); *Masterson v. First Federal Sav. and Loan Ass'n.* 53 F.R.D. 313 (E.D.N.Y. 1971) (federal savings and loan association not agency). Thus, we hold Dr. Wald, the Hospital and the Medical School not to be agencies within the terms of § 1391(e), and this Court may not exercise jurisdiction over them on its authority.

CONCLUSION

(8) We note that once the defendants properly raised the

defense of lack of *in personam* jurisdiction by Fed.R.Civ.P. 12(b) motion, Dennie bore the burden of proof in establishing jurisdiction. *See e.g., Time Share, supra; Compagnie des Bauxites de Guinee v. L'Union,* 723 F.2d 357 (3d Cir.1983). Here, the Court is required to determine factual issues outside the pleadings; whether personal jurisdiction lies in the Virgin Islands. *Time Share, supra* n. 9 at 66. Dennie may not successfully rely on his bare pleadings to withstand a motion to dismiss but should have established jurisdictional facts through sworn affidavits or other competent evidence. *See Int'l Ass'n of Machinist & Aerospace Workers v. Northwest Airlines, Inc.,* 673 F.2d 700 (3d Cir.1982). That Dennie did not do.

We recognize that the plaintiffs have outstanding interrogatories to Dr. Wald, and a production request for documentation referred to in his answers to those interrogatories. We have carefully read the complaint, and the questions asked of the interrogatories, and are satisfied that we need not await the filing of any response to reach the conclusions contained in this opinion. The complaint alleges that the defendants are covered by the Privacy Act only by reason of receipt of research grants from a federal agency. Since we have held herein that even accepting such a factual allegation as true, it is not enough to bring defendants within the requirements of the Act, any discovery to establish that allegation would be meaningless.

Finally, we recognize that dismissal of this complaint almost four years to the date after Dr. Wald's letter was written will seriously hinder Dennie's ability to maintain his action in a court of competent jurisdiction. To this Court's knowledge, no protective actions have been filed and the statutes of limitations run untolled. Any future difficulty will have been caused by no one but Dennie, however. Despite the knowledge that none of the defendants had or have any relationship with the Virgin Islands sufficient to make them amenable to suit in this forum, and that an alternative forum exists where he could get personal jurisdiction over all the defendants, Dennie has repeatedly filed his complaints here. While precedence is not always destiny, it unfortunately appears to be

so in this matter. For the foregoing reasons the complaint herein will be dismissed for lack of personal jurisdiction over the defendants.

Appendix B

Order Affirming District Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3485

KELVIN DENNIE individually and on behalf
of his minor son, NKOSI DENNIE

Appellants

v.

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE
PRESBYTERIAN UNIVERSITY HOSPITAL,
NIEL WARD, JOHN DOE

On Appeal from the United States District Court
for the Virgin Islands (St. Croix)
(C.A. No. 83-0389)
(Honorable David V. O'Brien)

Argued April 22, 1985

Before: ADAMS, GARTH and BECKER, Circuit Judges

JUDGEMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

A. L. M. Adams

Circuit Judge

ATTEST:

Sally Mrvos

Sally Mrvos, Clerk

DATED: May 3, 1985

Appendix C

Order Denying Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3485

KELVIN DENNIE individually and on behalf
of his minor son, NKOSI DENNIE

Appellants

v.

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE
PRESBYTERIAN UNIVERSITY HOSPITAL,
NIEL WARD, JOHN DOE

(C.A. No. 83-0389)

SUR PETITION FOR REHEARING
IN BANC

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges.

The petition for rehearing in banc filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for hearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing in banc is denied.

BY THE COURT,

A. L. M. Adams

Circuit Judge

DATED: June 7, 1985

Appendix E

21 CFR 20.63

Personnel, medical and similar files, disclosure of which constitutes a clearly unwarranted invasion of personal privacy.

A request for all records relating to a specific individual will be denied as a clearly unwarranted invasion of personal privacy unless accompanied by the written consent of the individual named.

21 CFR § 21.1(a)

General Provisions

This subpart establishes procedures to implement the Privacy Act of 1974 (5USCS552a). It applies to records about individuals that are maintained, collected, used, or disclosed by the Food and Drug Administration and contained in Privacy Act Record System.

Appendix F

USCS Constitution, Art. III s 2, cl. I
Subjects of Jurisdiction

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, - to all Cases affecting Ambassadors, other Public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a party; - to Controversies between two or more States; - between citizens of different States; - between citizens of the same State claiming Lands under Grants of different States, and between a State, of the Citizens thereof, and Foreign States, Citizens or Subjects.

28 USCS 1331
Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

48 USCS 1612
Jurisdiction of District Court; transfer actions

The District Court of the Virgin Islands shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy. It shall have general original jurisdiction in all other causes in the Virgin Islands, exclusive jurisdiction over which is not conferred by this Act upon the inferior courts of the Virgin Islands. When it is in the interest of justice to do so the district court may on motion of any party transfer to the district court any action or proceeding brought in an inferior

court and the district court shall have jurisdiction to hear and determine such action or proceeding. The district court shall also have appellate jurisdiction to review the judgements and orders of the inferior courts of the Virgin Islands to the extent now or hereafter prescribed by local law.

Rule 4(d)(3), Fed. Rule of Civ. P.
Summons: Personal Service

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and, the statute so requires, by also mailing a copy to the defendant.